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# In the Supreme Court
## of the United States

OCTOBER TERM, 1956
No. 204

WILLIAM BENZ, et al, Individually and as Representatives of All of the Members of the SAILORS' UNION OF THE PACIFIC,

M. D. MacRAE, et al, Individually and as Representatives of All of the Members of Local 90 of the NATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL,

JEFF MORRISON, et al, Individually and as Representatives of All of the Members of ATLANTIC AND GULF DISTRICT, SEAFARERS' INTERNATIONAL UNION, AFL,

*Petitioners,*

vs.

COMPANIA NAVIERA HIDALGO, S. A., a corporation,

*Respondent.*

## PETITIONERS' REPLY BRIEF

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

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## SUBJECT MATTER INDEX


| | Page |
|---|---|
| Argument No. I | 2 |
| Argument No. II | 6 |
| Appendix A | 11 |


## CASES AND AUTHORITIES CITED

### STATUTES


| | |
|---|---|
| 29 USCA Sec. 152 (6) | 7 |
| 29 USCA Sec. 187 | 8 |


### CASES


| | |
|---|---|
| Petition of Georgakopoulos, 81 F. Supp. 411, 175 F2d 730 | 9 |
| Lauritzen v. Larsen, 345 U.S. 571, 73 S. Ct. 921, 87 L. Ed. 1254 | 9 |
| Local Union No. 25 v. New York, New Haven & H. R. Co., U.S. , 76 S. Ct. 227 | 7 |
| Matson Navigation Co. v. Seafarers' International Union, 100 Fed. Supp. 730 | 5 |
| Norris Grain Co. v. Seafarers' International Union, 232 Minn. 91, 46 N.W. 2d 94, 26 LRRM 2587 (1950) | 7 |
| Peninsular & Occidental Steamship Co. v. NLRB, 98 F2d 911 | 3, 4 |
| Rees v. U. S., 95 F2d 784 | 3 |
| Sailors' Union of Pacific AFL and Moore Dry Dock Co., 92 NLRB 547, 27 LRRM 1108 | 7 |
| Southern Steamship Co. v. NLRB, 316 U.S. 31, 86 L. Ed. 1246, 62 S. Ct. 886 | 3, 4 |
| The WIND, 22 F. Supp. 883 | 9 |

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### QUESTIONS PRESENTED

The respondent in its brief in opposition to the Petition for Writ of Certiorari did not attempt to answer our argument on the pre-emption by the Labor Manage-

ment Relations Act of 1947 of the jurisdiction of the court below to award damages for peaceful picketing under the State law. It contends, however, that the Act does not apply to the instant cases because either the general maritime law or foreign law is controlling. We shall answer these contentions separately.

## ARGUMENT

### I. The Federal Labor Law Rather Than the Maritime Law Governs Picketing on the Shore by Persons Who Are Not Members of the Crew of the Vessel.

To support its argument that the maritime law applies in the instant cases rather than the federal labor law the respondent asserts that the original crew members were still under Articles with the vessel. However, the record is clear that the crew had been discharged (Tr. 241). The crew had been removed from the vessel on September 26, 1952 (Tr. 241). They had been jailed by the Immigration authorities and were still in custody and had been ordered deported (Tr. 18). They had filed a libel against the vessel for the collection of their wages (Tr. 19). The respondent was not attempting to operate is vessel, and the picketing for which damages were awarded in these cases did not begin until about three weeks later, on October 14, 1952 (Tr. 241).

The respondent has not cited any case in which either an injunction was issued or damages allowed on account of picketing of a vessel by a union representing crew members who had been discharged.

*Rees v. U. S.*, 95 F2d 784, relied upon by the respondent, was a criminal case brought under the mutiny statutes of the United States, It involved only the criminal liability of the crew members for their refusal to work while under Articles. It did not involve the tort liability of persons who were not crew members who picketed the vessel.

Also, it is important to note that in the *Rees* case and the other cases relied upon by th respondent, the courts in discussing the duties of seamen under Articles on American vessels are careful to point out that the seamen's duties are predicated upon the rights and protection which they receive under the American law. In the *Rees* case the court said:

> "The laws of the United States concerning seamen, their rights and their treatment, are more liberal and more favorable to the seamen than the laws of any other country. Great care has been taken by Congress to safeguard their rights and protect them from injustice."

In the instant cases, however, the vessel involved was registered under the flag of Liberia and we are not advised by pleading or proof of the Liberian law with respect to Articles or mutiny.

The respondent has cited *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 86 L. Ed. 1246, 62 S. Ct. 886, and *Peninsular & Occidental Steamship Co. v. NLRB*, 98 F2d 911, for the proposition that although a shipowner is guilty of an unfair labor practice in discharging striking crew members, that the striking crew members nevertheless should not be reinstated to their jobs.

Such was not the holding in the *Peninsular & Occidental Steamship Co.* case. The court specifically held that the crew members who were under Articles and who "refused to do any work, went on a sit-down strike, took possession of the ship, * * *" were discharged "on account of threats of sabotage etc. and not on account of union membership or activity, there was no unfair labor practice." There was no reinstatement, therefore, because there was no unfair labor practice. The court said:

> "It is not a case in which there had been a strike and the employer had declined to re-employ some of the strikers * * *."

In the *Southern Steamship Co.* case this court held that the crew members who went on strike while under Articles committed mutiny under the laws of the United States. The court then concluded as follows:

> "Consequently and despite the initial unfair labor practice which caused the strike we hold that the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the policies of the Act [this Chapter].'"

This court went on, however, to make it clear that notwithstanding this decision, the Union could have, and should have, taken such measures as were available to it in furtherance of its labor dispute with the shipowner, so long as the action taken did not in itself violate the maritime law. The court said:

> "It should be stressed that the view we have taken does not prevent the redress of grievances under the Act. At any time following the certification of the N.M.U. in January, 1938, the union and the Board could have secured the assistance of the

courts in forcing petitioner to bargain. The importance of seeking such assistance promptly is strikingly illustrated in this case. Had the union and the Board done so, the unfortunate occurrence at Houston might have been averted. *And what is more, nothing that we have said would prevent the union from striking, picketing or resorting to any other means of self-help, so long as the time and place it chooses do not come within the express prohibition of Congress.*" (Emphasis ours) (316 U.S. at 48, 62 S. Ct. at 895)

This court was, of course, referring to the right of a union to picket a vessel although the crew of the vessel may be under Articles and unable to go on strike without being guilty of mutiny. If such picketing is lawful under the labor it will not be restrained nor be considered tortious merely because a shipowner or a vessel is involved, so long as the crew members who are under Articles do not violate the terms of their Articles or commit any act declared unlawful by the maritime law. Such picketing was declared lawful in *Matson Navigation Co. v. Seafarers' International Union*, 100 Fed Supp 730 (1951 DC Md).

The picketing in the instant cases was not in violation of the maritime law but was conducted by non-crew members on the dock. It was not begun until about three weeks after the crew members had been discharged and had left the vessel. The picketing could not have precipitated a violation of the maritime law, because neither the unions nor the persons they represented were at the time of the picketing under Articles, nor serving under the jurisdiction of the maritime law.

**II. The Application of the National Labor Relations Act as Amended to Picketing by American Unions of a Foreign Vessel.**

The respondent contends that the Labor Management Relations Act is inapplicable to this case because of the "foreign nature of the dispute." The respondent stresses the fact that the employer is a foreigner operating a foreign-flag vessel, which has employed alien seamen. The respondent fails to point out, however, that it was admitted in these cases that the foreign ship owner was engaged in the carriage of grain between ports of the United States and the Orient and that the American unions had an economic interest in the working conditions of the seamen employed aboard vessels engaged in that trade (Tr. 243).

Although respondent concedes that "Congress must be presumed to intend to limit labor legislation to the 'territorial jurisdiction' of the United States," nevertheless respondent insists that the provisions of the National Labor Relations Act do not apply to these actions for damages for picketing conducted by the petitioners ashore in the United States.

If it is assumed for the purpose of argument that the National Labor Relations Board has ruled that it lacks jurisdiction to interfere in the internal economy of a foreign vessel by holding a representation election aboard the vessel, it does not follow that the provisions of the Act are not applicable to picketing conducted by American Unions on the dock. Indeed the National Labor Relations Board exercised jurisdiction with respect to picketing of the very same foreign vessel in-

volved in the case referred to by the respondent. *Sailors' Union of the Pacific AFL and Moore Dry Dock Co.*, 92 NLRB 547, 27 LRRM 1108 (1950).

It was also held in *Norris Grain Co. v. Seafarers' International Union*, 232 Minn. 91, 46 N.W. 2d 94, 26 LRRM 2587 (1950), that the remedy under the National Labor Relations Act was exclusive, where a Canadian vessel with a Canadian crew was picketed at a Minnesota dock.

These decisions are in keeping with the definition of "commerce" in the National Labor Relations Act which includes commerce "between any foreign country and any state." 29 USCA Sec. 152 (6).

Very recently this court in *Local Union No. 25 v. New York, New Haven & H. R. Co.*, U.S. , 76 S. Ct. 227 (1956), held that the fact that a railroad was expressly excluded from the terms of the National Labor Relations Act did not prevent the railroad from seeking relief through the National Labor Relations Board from picketing by a trucking union which constituted a secondary boycott in violation of Section 8 (b) (4) (A) of the National Labor Relations Act. The court said:

> "The N.L.R.B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice. Sec. 10 (b). Under the Board's Rules and Regulations such a charge may be filed by 'any person'. * * * Furthermore, since railroads are not excluded from the Act's definition of 'person', they are entitled to Board protection from the kind of unfair labor practice proscribed by Sec. 8 (b) (4) (A)."

The instant cases involve actions for damages on account of picketing. The picketing was either protected or prohibited by the provisions of the Labor Management Relations Act. If the picketing was prohibited by the terms of the Act, a remedy in damages and a procedure for the recovery of damages is provided for under the Act. Title 29 USCA Sec 187.

Subsection (b) of that section provides in part as follows:

> "Whosoever shall be injured in his business or property by reason of any violation of sub-section (a) of this section may sue therefor * * * and shall recover the damages by him sustained. * * *."

The Labor Management Relations Act does not limit the remedy to damages to persons subject to the Act, but allows damages to "Whosoever shall be injured. * * *." The alleged damages were due to picketing conducted on American soil by members of American unions. The American unions and their members were clearly subject to the Act. The foreign shipowner could and should have pursued its remedies pursuant to the terms of the Act.

The fallacy of respondent's contention that the Labor Management Relations Act does not apply to these cases because of the foreign nature of the dispute is readily demonstrated by determining which law is applicable, assuming that the dispute involves "a contract of employment between an alien employer and alien employees to be wholly performed aboard a foreign vessel." Clearly such a dispute involving internal discipline aboard a ship is governed by the law of the

flag of the vessel. See *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 87 L. Ed. 1254 (1953). This would be particularly true in the instant case because of the existence of a treaty between the governments of the United States and Liberia which provided that the Consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country. 54 Stat. 1751. See Appendix A. It has also been held in a number of cases that where such internal disputes arise, the Consul has exclusive jurisdiction over the controversy and the courts are without jurisdiction except to aid the Consul. See *The WIND*, 22 F. Supp. 883; *Petition of Georgakopoulos*, 81 F. Supp. 411, 175 F2d 730 (1949).

The remedy allowed by the court below in damages against the petitioners was based upon the law of the State of Oregon. The fact that the respondent shipowner was a foreigner can certainly be no ground upon which to allow recovery under State rather than Federal law. The foreign aspect of the dispute might invite a choice of foreign law but could not govern a choice between State and Federal law.

Respectfully submitted,

KNELAND C. TANNER,
RICHARD R. CARNEY,
Counsel for Petitioners.

## APPENDIX A

Article 10 of the Treaty, entered into in 1939 (54 Stat. 1751) reads as follows:

"A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto, provided, however, that such jurisdiction shall not exclude the jurisdiction conferred on local authorities under existing or future laws.

"When an act committed on board of a private vessel under the flag of the State by which the consular officer has been appointed and within the territorial waters of the State to which he has been appointed constitutes a crime according to the laws of that State, subjecting the person guilty thereof to punishment as a criminal, the consular officer shall not exercise jurisdiction except insofar as he is permitted to do so by the local law.

"A consular officer may freely invoke the assistance of the local police authorities in any matters pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given.

"A consular officer may appear with the officers and crews of vessels under the flag of his country before the judicial authorities of the State to which he is appointed for the purpose of observing the proceeding or of rendering assistance as an interpreter or agent."